IN THE COURT OF APPEALS OF THE STATE OF ALASKA

RYAN M. HERBERT, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11675 Trial Court No. 1SI-12-243 CR MEMORANDUM OPINION No. 6273 — January 20, 2016

Appeal from the Superior Court, First Judicial District, Sitka, David V. George, Judge.

Appearances: David T. McGee, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Mary A. Gilson, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Coats, Senior Judge.*

Judge COATS.

Ryan M. Herbert was convicted of felony driving under the influence. Before his trial, Herbert filed a motion to suppress the evidence that he admitted to the arresting officer that he had been arrested twice before for driving under the influence.

* Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

Herbert argued that this admission was obtained in violation of his *Miranda* rights, and that the admission ultimately led to his conviction for a felony offense.

The superior court denied Herbert's motion to suppress. Although the court ruled that Herbert's *Miranda* rights had been violated, the court concluded that the evidence of his prior convictions was nevertheless admissible under the inevitable discovery doctrine.

On appeal, Herbert argues that the superior court erred in concluding that the inevitable discovery doctrine applied in his case. He also argues that the court erred in refusing to order the State to produce additional evidence that might have supported his claim that the police would not have inevitably discovered his prior convictions. For the reasons explained below, we find no merit to these claims and affirm the decisions of the superior court.

Facts and proceedings

On July 27, 2012, at about 3:00 a.m., Herbert was arrested for driving under the influence and placed in the back of a patrol car for transport to the Sitka police station. En route to the station, the arresting officer, Sergeant David Johnson, asked Herbert if he had any prior arrests for driving under the influence. Herbert responded: "Twice ... [y]ou were there for the first time."

Johnson then asked the police dispatcher on duty, Tara Smith, to check whether Herbert had prior DUI convictions. Smith had already searched Herbert's record in the Alaska Public Safety Information Network (APSIN),[1] so she told Johnson that Herbert had at least one prior conviction (a 2003 DUI conviction in Alaska). Smith then checked the FBI's National Crime Information Center (NCIC) database, which

[1] Smith testified that her normal practice was to search APSIN when the arresting officer identified a potential drunk driver and began field sobriety tests.

showed no outstanding warrants. Because Herbert's APSIN record showed that he previously had a California driver's license, Smith checked Herbert's California record in the state-by-state National Law Enforcement Training System (NLETS) database, in which she discovered a 2008 DUI conviction in California.

At the police station, Herbert's breath test showed that his blood-alcohol level was .114 percent, well over the legal limit of .08 percent.[2] Because Herbert had two prior DUI convictions within the previous ten years, he was indicted for felony driving under the influence.[3]

Before his trial on that charge, Herbert moved to suppress the evidence that he told Sergeant Johnson he had two prior DUI arrests, arguing that the evidence was obtained in violation of his *Miranda* rights. Herbert also moved to dismiss the felony indictment, asserting that the evidence of his prior California conviction was the tainted fruit of his illegally obtained admission. The State argued in response that the evidence would have been inevitably discovered, because in DUI cases the police routinely check the NLETS database when a suspect's driving record in APSIN indicates a previous license in another state. The State also contended that there was no *Miranda* violation because Herbert's statements were not the product of interrogation.

The superior court held an evidentiary hearing on Herbert's motion. After the hearing, the court ruled that Herbert was interrogated in violation of his *Miranda* rights, and the court therefore suppressed the evidence of Herbert's admission to Johnson that he had two prior DUI arrests. But the court held that the evidence of Herbert's prior convictions was nevertheless admissible under the inevitable discovery exception to the exclusionary rule — because Sergeant Johnson had not knowingly and intentionally

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[2] AS 28.35.030(a)(2).

[3] AS 28.35.030(n).

violated Herbert's *Miranda* rights, and because Smith followed her standard procedure when she checked all three databases for prior DUI convictions.

Following these rulings, Herbert filed a motion for reconsideration. Herbert also filed a supplemental motion to compel, asking the court to order the State to produce additional records of Smith's record checks to verify her testimony that she routinely checked the NLETS database when an APSIN record showed that a suspect had a driver's license in another state. The superior court denied the motion for reconsideration and the motion to compel, observing that Herbert had offered no persuasive explanation for why he waited until after the court ruled on his motion to suppress to move for production of these additional records.

Herbert was convicted of felony driving under the influence in a bench trial. He now appeals.

Why we affirm the superior court's ruling that the evidence of Herbert's prior convictions was admissible under the inevitable discovery doctrine

Herbert argues that the superior court erred in ruling that the evidence of his prior DUI convictions was admissible under the inevitable discovery doctrine.

In *Smith v. State*, the Alaska Supreme Court adopted the inevitable discovery doctrine as an exception to the exclusionary rule under Alaska law.[4] The supreme court held that "if the prosecution can show, by clear and convincing evidence, that illegally obtained evidence would have been discovered through predictable investigative processes, such evidence need not be suppressed as long as the police have not knowingly or intentionally violated the rights of the accused in obtaining that

[4] *Smith v. State*, 948 P.2d 473, 481 (Alaska 1997).

evidence."[5] The supreme court directed trial courts evaluating whether a particular act qualified as a "predictable investigatory procedure" to consider the "experience, ability, and knowledge of the investigator, as well as the quality and value of sources of information ... lawfully in [the investigator's] possession."[6]

Here, it was undisputed that the Sitka police routinely searched the APSIN and NCIC databases for prior convictions when a suspect was arrested for driving under the influence. The only dispute was whether checking the state-by-state NLETS database was a "predictable investigatory procedure" when a search of the other databases revealed that the suspect previously had a driver's license in another state. As we explained above, it was this last type of records search that uncovered Herbert's 2008 conviction in California.

At the evidentiary hearing, Herbert presented evidence of all the record checks performed by the Sitka Police Department in DUI cases in the six months prior to Herbert's arrest that showed that the suspect had a driver's license in another state — a total of four cases. In one of those prior cases the record check was performed by Smith, the same dispatcher who handled Herbert's case. In that prior case, consistent with what Smith testified was her standard procedure, Smith checked for DUI convictions in the APSIN, NCIC, and NLETS databases.

The other three record checks were performed by Smith's supervisor, Lynette Blankenship, who did *not* take the additional step of checking for convictions in NLETS — even though each of the other suspects' APSIN records revealed a previous driver's license in another state. At the evidentiary hearing, Smith testified that if she,

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[5] *Id.*

[6] *Id.* at 480-81 (citation omitted) (internal quotation marks omitted).

rather than her supervisor, had done these record checks, she would have run an NLETS search in each case.

After hearing this evidence, the superior court found that Smith's testimony was credible and that Smith routinely searched the NLETS database when the other databases suggested that the suspect might have a driver's license in another state because that state might have information about the suspect. The court further found that Smith followed that standard procedure in Herbert's case: when she learned from Herbert's APSIN record that he previously had a California driver's license, she searched the NLETS database for California and discovered his 2008 conviction. The court concluded by clear and convincing evidence "that the procedures employed by Smith to check Herbert's criminal history in this case were proper and predictable, and were routinely executed."

Herbert argues that this conclusion was error because it was based on a "single data point" — the evidence that Smith also checked the NLETS database in one prior case. Herbert points out that in three of the four cases in evidence — cases in which Smith's supervisor, rather than Smith, conducted the records search — no search was done in the NLETS database, even though the information obtained from the other databases showed the suspect had an out-of-state driver's license.

The superior court found this argument unpersuasive, as do we. In *Smith*, the Alaska Supreme Court emphasized that, to invoke the inevitable discovery exception, the prosecutor must show that "certain proper and predictable investigatory procedures would have been utilized *in the case at bar*" and that "those procedures would have inevitably resulted in the discovery of the evidence in question."[7] The supreme court

[7] *Smith*, 948 P.2d at 480 (emphasis omitted and added).

further instructed trial courts to consider the "experience, ability, and knowledge" of the particular investigator involved.[8]

In this case, it was Smith, not her supervisor, who ran the records check, and she testified that she did so as part of her normal procedure, not in response to a specific request from Sergeant Johnson. Smith had ten years of experience conducting records checks, and she trained others in the department. Moreover, at the evidentiary hearing, Herbert offered no evidence to dispute that Smith routinely checked the NLETS database in cases such as his; instead, he relied on evidence that Smith's supervisor did not routinely run such checks. Given this evidence, we find no error in the court's finding that Smith would have inevitably discovered Herbert's prior California conviction.

In the alternative, Herbert argues that the superior court erred in relying on the inevitable discovery doctrine because Sergeant Johnson knowingly violated his *Miranda* rights when he questioned him about prior arrests. As noted earlier, in *Smith* the supreme court held that the inevitable discovery rule "should not be available in cases where the police have intentionally or knowingly violated a suspect's rights."[9]

The superior court found that Sergeant Johnson was unaware that a *Miranda* warning was required under the circumstances, and that the officer asked Herbert about his prior convictions to facilitate the booking process — not to elicit incriminating information. More specifically, the court found credible Johnson's testimony that he wanted to know whether Herbert had prior convictions because that information influenced, among other things, whether Herbert could be released on his own recognizance and whether it would be necessary to impound Herbert's vehicle.

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[8] *Id.* at 480-81 (citation omitted).

[9] *Id.* at 481.

Herbert argues that even assuming Sergeant Johnson had these administrative purposes for asking about his prior DUI convictions, his *Miranda* violation should be deemed "knowing" because a reasonable person in Johnson's position would know that the question was likely to elicit incriminating information. Herbert relies on our decision in *Klemz v. State*, where we held that even a purely administrative question by a law enforcement officer may constitute "interrogation" for purposes of *Miranda* if a reasonable person under the circumstances would know it was likely to elicit an incriminating response.[10]

Herbert's argument confuses two distinct analyses. The issue in *Klemz* was whether an officer's question is exempt from the *Miranda* definition of "interrogation" if the officer had a plausible administrative purpose for asking the question.[11] Here, we are not called upon to resolve whether Johnson interrogated Herbert in violation of *Miranda*; the only question squarely before us is whether Sergeant Johnson acted in bad faith, such that the inevitable discovery rule would not apply.[12]

Herbert contends that "the only credible interpretation of Sergeant Johnson's testimony is that he knew *Miranda* warnings were necessary, but questioned Herbert anyway." But in interpreting Johnson's testimony, we defer to "the superior court's greater ability to assess witness credibility."[13] Viewing the record with this appropriate deference, we find no error in the superior court's conclusion that Sergeant Johnson was unaware that a *Miranda* warning was required and did not knowingly or

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[10] *Klemz v. State*, 171 P.3d 1169, 1172 (Alaska App. 2007).

[11] *Id.*

[12] *See Smith v. State*, 992 P.2d 605, 610 (Alaska App. 1999) ("The doctrine of inevitable discovery is available so long as the police did not act in bad faith.").

[13] *Fyffe v. White*, 93 P.3d 444, 451 (Alaska 2004).

intentionally violate Herbert's rights.[14] We accordingly affirm the superior court's decision denying Herbert's motion to suppress.

Why we conclude that the superior court did not abuse its discretion in denying Herbert's supplemental motion to compel

Herbert also argues that the superior court should have granted his motion to compel the State to produce more of Smith's past record checks. Herbert sought this additional evidence to establish whether it corroborated Smith's testimony that she routinely checked the NLETS database when searches in other databases showed that the suspect previously had a driver's license in another state. But Herbert waited until after his suppression motion was litigated, and after the superior court denied that motion, to ask for this additional evidence. Given this circumstance, the superior court did not abuse its discretion in denying Herbert's request.[15]

Conclusion

We AFFIRM the decisions of the superior court.

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[14] The State argues that a *Miranda* warning was not required under the circumstances. Because the State did not file a cross appeal on this question, we do not address this argument.

[15] *See Booth v. State*, 251 P.3d 369 (Alaska App. 2011).